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Supreme Court of the United States

October Term, 1902

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JAMES H. McKENNEY,
Clerk.

No. 267

GEORGE H. MIFFLIN ET AL.
Appellants

vs.

BENJAMIN F. DUTTON ET AL.
Appellees

No. 268

GEORGE H. MIFFLIN ET AL.
Appellants

vs.

THE R. H. WHITE COMPANY
Appellees

BRIEF ON BEHALF OF THE APPELLEES

Evening Post Job Printing Office, New York.

Supreme Court of the United States.

No. 267.
GEORGE H. MIFFLIN *et al.*,
Complainants, Appellants,

vs.

BENJAMIN F. DUTTON *et al.*,
Defendants, Appellees.

No. 268.
GEORGE H. MIFFLIN *et al.*,
Complainants, Appellants,

vs.

THE R. H. WHITE COMPANY,
Defendant, Appellee.

BRIEF ON BEHALF OF THE APPELLEES.

Statement.

As these cases involve questions which are, to a large extent, identical, they will be discussed together. Each case is an appeal from the decree of the United States Circuit Court of Appeals for the First Circuit, affirming the decree of the United States Circuit Court for the District of Massachusetts, sustaining a demurrer to the bill of complaint for insufficiency, and dismissing the bill, with costs.

Each of these cases was a bill to protect an alleged copyright, the one in "The Minister's Wooing" and the other in "The Professor at the Breakfast Table."

SUBDIVISION A.

"The Minister's Wooing."

Harriet Beecher Stow was the authoress of this work (R.,* p. 2).

The appellants' claim to copyright protection for the work, or any part thereof, rests:

(1) Upon an alleged copyright by Mrs. Stowe of "The Minister's Wooing" (p. 4); and

(2) Upon alleged copyrights by Ticknor & Fields of the two numbers of the *Atlantic Monthly* for November and December, 1859 (10), containing *the last thirteen chapters* of "The Minister's Wooing" (2 and 3).

"The Minister's Wooing" consisted of 42 chapters (2), and was published in print by Phillips, Sampson & Co. and Ticknor & Fields at Boston, in and as part of thirteen successive numbers of the *Atlantic Monthly* for the months of December, 1858, to December, 1859, both inclusive (2 and 3), with the consent and authority of Mrs. Stowe, under a contract between her and said publishers (3 and 4).

Each of said thirteen numbers of the *Atlantic Monthly* was a bound volume of 128 printed pages, and consisted of a part of "The Minister's Wooing" and other literary compositions (3).

The first 29 chapters of "The Minister's Wooing" were published in the first eleven of said thirteen numbers of the *Atlantic Monthly*, prior to September 28, 1859 (2), and *without any attempt to secure a copyright.*

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* Under this subdivision the references are to the pages of the record of Mifflin v. Dutton.

Afterwards and on October 14, 1859, Mrs. Stowe entered "The Minister's Wooing" for copyright in *her own name* (4).

On October 15, 1859, Mrs. Stowe published the *whole* of "The Minister's Wooing" in separate book form (pp. 4 and 5).

Thereafter and between October 21 and November 23, 1859, the last 13 chapters of "The Minister's Wooing" were published in the two numbers of the *Atlantic Monthly* for November, 1859, and December, 1859 (pp. 2 and 3).

Said numbers of the *Atlantic Monthly* for November and December, 1859, gave no information of copyright by *Harriet Beecher Stowe.* The only notice of copyright given in those numbers was the following notice on the page succeeding the title page: "Entered according to Act of Congress in the year 1859 by *Ticknor & Fields* in the Clerk's office of the District Court of Massachusetts," and the following notice on the page of each number where the part of "The Minister's Wooing," therein published began: "Copyright secured by the author in *Great Britain* and *France*" (5).

Said numbers of the *Atlantic Monthly* for November and December, 1859, were entered for copyright by Ticknor & Fields (10) but *after* Mrs. Stowe had published the *whole* of "The Minister's Wooing" in book form (10).

In 1887 Mrs. Stowe deposited the title of "The Minister's Wooing" a second time and took the other steps prescribed by the statute for renewing a copyright (5).

In 1896 Mrs. Stowe assigned to complainants her claim to copyright in "The Minister's Wooing" (5).

The defendants are charged with having sold since October 1, 1899, copies of "The Minister's Wooing," copied from said thirteen numbers of the *Atlantic Monthly* and which were exact copies, word for word, of "The Minister's Wooing" published in the aforesaid numbers of the *Atlantic Monthly*, without any other matter (5 and 6).

POINTS.

I.

It is "the settled law of this country that the right of an author to a monopoly of his publications is measured and determined by the copyright act."

Holmes *vs.* Hurst, 174 U. S., 82, 85.

"The right of action as well as the copyright itself is wholly statutory, and *the means of securing any right of action are only those prescribed by Congress.*"

Thompson *vs.* Hubbard, 131 U. S., 123, 151.

II.

These cases arise under the act of 1831 (Ch. 16, 4 Stat. at L., 436), and the conditions precedent to the perfection of a copyright under that act were:

(1) The deposit "before publication" of a printed copy of the title of the book (Sec. 4);

(2) The delivery to the prescribed clerk of a copy of the book within the prescribed time (*Ib.*);

(3) The insertion of notice of copyright in the prescribed form in all published copies (Sec. 5).

Thompson *vs.* Hubbard, 131 U. S., 123, 150.

III.

The two copyrights which were entered by Ticknor & Fields on the November and December, 1859, numbers of the *Atlantic Monthly* (10) were clearly

invalid, so far as they related to the part of "The Minister's Wooing" therein published, because both of those copyrights were entered *after* publication of the *whole* of "The Minister's Wooing" by Harriet Beecher Stowe in book form (10).

Holmes *vs.* Hurst, 174 U. S., 82.

Moreover, these magazine copyrights expired in 1887 and were not renewed.

IV.

The copyright entered by Harriet Beecher Stowe on "The Minister's Wooing" was invalid.

(*A.*) As the first twenty-nine chapters of "The Minister's Wooing" were published in the *Atlantic Monthly* before Mrs. Stowe entered "The Minister's Wooing" for copyright (p. 4), she could not obtain copyright for those twenty-nine chapters, and to that extent her attempted copyright of "The Minister's Wooing" was invalid.

Holmes *v.* Hurst, 174 U. S., 82; affg. s. c., 51 U. S. App., 271; affg. s. c., 76 Fed. Rep., 757.

Hence by entering "The Minister's Wooing" for copyright Mrs. Stowe secured a valid copyright only on the then unpublished part of that work, to wit, the last thirteen chapters thereof.

(*B.*) The copyright entered by Harriet Beecher Stowe on "The Minister's Wooing"—originally valid *only as to the last thirteen chapters*—was *afterwards wholly invalidated* by her failing to insert the proper notice of her copyright in the November and December, 1859, numbers of the *Atlantic Monthly*, in which the last thirteen chapters of "The Minister's Wooing" were also published.

(*a.*) "The Minister's Wooing" was entered for copyright by *Harriet Beecher Stowe* in *her* name on October 14, 1859 (p. 4).

(*b.*) Thereafter the last thirteen chapters of "The Minister's Wooing" were published by Ticknor & Fields in the two numbers of the *Atlantic Monthly* for November, 1859, and December, 1859 (2 and 3), with the consent and authority of Mrs. Stowe and under a contract between her and the publishers (4), and thousands of copies of each of said two magazine numbers were sold to the public between October 21, 1859, and January 1, 1860 (3).

(*c.*) The bill expressly avers (p. 5) that the November and December, 1859, numbers of the *Atlantic Monthly* contained no notice of copyright except (1), on the page following the title page of each number, the words, "Entered according to Act of Congress in the year 1859 by *Ticknor & Fields* in the Clerk's office of the District Court of the District of Massachusetts"; and (2), on the page of each number on which the part of "The Minister's Wooing" therein published began, the words, "Copyright secured by the author in *Great Britain* and *France*."

These notices of copyright by Ticknor & Fields were proper notices of copyrights which had been actually entered by them on those two magazine numbers (p. 10), but they were ineffectual because those copyrights were invalid in respect of the last 13 chapters of "The Minister's Wooing," therein published, in consequence of the fact that those copyrights were entered *after Mrs. Stowe had published the entire work in book form* (Point III., *supra*).

Such notices were only notices of said invalid copyrights taken out by *Ticknor & Fields* on the two magazine numbers. They were not a compliance with the notice required by Section 5 of the

Act of 1831 of the independent copyright taken out by *Harriet Beecher Stowe* on "The Minister's Wooing," because the name of Harriet Beecher Stowe was *wholly* omitted from the notice.

Section 5 of the Copyright Act of 1831 (4 St. at L., 437) enacts as follows: "*No person shall be entitled to the benefit of this act* unless he shall give information of copyright being secured, by causing to be inserted in the several copies of each and every edition published during the term secured, on the title page or the page immediately following, if it be a book, * * * the following words, viz.: *Entered* according to Act of Congress in the year *by A. B.* in the Clerk's office of the District Court of (as the case may be)."

"This requirement of giving the prescribed notice has always been held, under all the statutes, to be one of the conditions precedent to the perfection of a copyright, the other two being the deposit before publication of the printed copy of the title and depositing in the proper office within the prescribed time of a copy or copies of the book" (Thompson *v.* Hubbard, 131 U. S., 123, 149; Drone Copyright, 264:

"While the Courts have been liberal in holding any form of notice sufficient which contains the *essentials* of 'name,' 'claim of exclusive right' and 'date when obtained' (Lithograph Co. *v.* Sarony, 111 U. S., 53; Bolles *v.* Outing Co., 23 C. C. A., 594), they have not yet sustained the sufficiency of a notice which *wholly* omits some one of these essentials."

Lacombe, *J.*, Hoertel *vs.* Tuch, 94 Fed. R., 844.

There can be no valid copyright if the name of the person taking out the copyright is *wholly* omitted from the notice.

Thomson *v.* Hubbard, 131 U. S., 123.

Osgood *v.* Aloe Ins. Co., 83 Fed. R., 470; s. c., 69 Fed. R., 291.

Higgins *vs.* Kueffel, 30 Fed. R., 627; affd., 140 U. S., 428.
7 Am. & Eng. Enc., 2d Ed., 557.
Jackson *v.* Walkie, 29 Fed. R., 15.
Baker *v.* Taylor, 2 Blatch., 82.

In discussing the statutory form of notice of copyright the appellants made in the courts below the extraordinary contention that notice of copyright by "Ticknor & Fields" was sufficient notice of copyright by Harriet B. Stowe, because "it is enough if the notice calls attention to the claim of copyright, the year in which the claim was made, and *some duly authorized person of whom inquiry could be made*," *i. e.*, for the omitted name of the person by whom the copyright was entered.

Under this novel contention if the name of the party entering the copyright may be omitted and "'he name of some duly authorized person of whom inquiry can be made" may be regarded as an equivalent, then, by a parity of reasoning, the date and all the other essentials, mentioned in the statutory form of notice, may, likewise, be omitted from the notice, and the simple notice "For copyright information apply to John Doe (the authorized agent)" will be sufficient.

The vice of the appellant's argument consists in the *assumption that notice of the copyright, either adual or constructive, is the equivalent of the specific notice required by statute.* The sole question is, has the owner of the copyright performed the *statutory* condition precedent to his purely *statutory* copyright of giving the notice in the manner and form prescribed by the act? If he has not, Section 5 of the statute in express terms denies him his purely *statutory* right of action. This point was sharply presented in Thompson *vs.* Hubbard, 131 U. S., 123. In that case the suit was brought by Hubbard against Thompson. Thompson had entered a book for copyright (p. 145) and assigned the copyright to Hubbard (*Ib.*), and the latter thereafter published the book without stating in the notice of copyright

the name of the person by whom it was entered (pp. 148, 149). Thompson thereafter published the book and, on being sued by Hubbard, objected that the *omission of Thompson's name from the notice of entry invalidated the copyright*, and the Supreme Court so held. *Now, Thompson certainly had actual knowledge of the fact that the copyright had been entered by himself*, and on that ground Hubbard contended that the statutory notice was not necessary as to Thompson. The Court disposed of that contention as follows (p. 151): "The view is urged that the only object of the notice required by the statute is to give notice of the copyright to the public, and that as Thompson himself took the copyright and had vested the title to it in Hubbard, he has no right to infringe the copyright, although it may be invalid as to the rest of the world. But we are of opinion *that the failure of Hubbard to comply with the statute operated to prevent his right of action against Thompson from coming into existence.* This right of action, as well as the copyright itself, is *wholly statutory*, and *the means of securing any right of action in Hubbard are only those prescribed by Congress* (citing cases)" (see also Holmes *v.* Hurst, 174 U. S., 82, 85). In other words, there is no equivalent for the statutory form of notice, not even actual notice.

The form of copyright notice prescribed by the Fifth Section of the Copyright Act of 1831 does not admit of the construction that the words " A. B." include the name of a person " of whom inquiry could be made," as claimed by the appellants.

Section 4 of the act prescribes a form of record for each copyright entry, in the following words: " Be it remembered that on the day of , , *A. B.*, of the said district, *hath deposited in this office the title of a book* * * * *the right whereof he claims*, as author (or proprietor, as the case may be)."

Section 5 prescribes a form of notice of the record, as follows: " *Entered* according to Act of Congress

in the year , by *A. B.*, in the Clerk's office, in the District of ."

Who is meant by A. B.? Clearly he, and he only, by whom the book has been "entered" for copyright—*i. e.*, the *person appearing of record to have deposited the title in the Clerk's office.* It cannot mean any other person, because there is no provision or room in the statute for any other name.

"*The exact form of the notice is prescribed by law and no equivalent is provided for, nor is any room for an equivalent left*" (Wheeler, *J.*, in Higgins *vs.* Kueffel, 30 Fed. Rep., at p. 628). In Thompson *vs.* Hubbard, 131 U. S., at pages 148 and 149, the Court said: "One of the forms used by Hubbard did not state the year in which the copyright was entered, or *by whom it was entered;* while the other form mentioned the year but not the *name.* * * * It is very clear that Hubbard as proprietor of the copyright was bound to give the statutory notice in the several copies of every edition published by him and that he *did not do so.*"

SUBDIVISION B.

"The Professor at the Breakfast Table."

Oliver Wendell Holmes was the author of this work (R.,* p. 2).

The appellant's claim to copyright protection for this work or any part thereof rests:

(1) Upon an alleged copyright by Oliver Wendell Holmes of "The Professor at the Breakfast Table" (4 and 5); and

(2) Upon an alleged copyright by Ticknor & Fields, of the December, 1859, number of the

* Under this subdivision the references are to the pages of the record in Mifflin *vs.* R. H. White Co.

Atlantic Monthly, containing a *part* of "The Professor at the Breakfast Table" (4).

"The Professor at the Breakfast Table" consisted of 12 component parts (2), all of which were published during the year 1859, by Phillips, Sampson & Company, and Ticknor & Fields, at Boston, in and as part of twelve successive monthly numbers of the *Atlantic Monthly*, for the months of January, 1859, to December, 1859, both inclusive (2 and 3), with the consent and authority of Dr. Holmes, under a contract between him and said publishers (3 and 4).

Each of the twelve numbers of the *Atlantic Monthly* was a bound volume of about 128 printed pages, and consisted of a part of "The Professor at the Breakfast Table" and other literary compositions (3).

No copyright is alleged to have been entered on any of said twelve numbers of the Atlantic Monthly save that for December, 1859.

On November 17, 1859, Ticknor & Fields deposited in the name of "Ticknor & Fields" a printed copy of the title of the number of the *Atlantic Monthly* for December, 1859, to wit: "Number 26, *Atlantic Monthly*. Devoted to Literature, Art and Politics. December, 1859," in the office of the proper clerk before publication of that number (4). The clerk recorded said title and a copy of that number was duly deposited with the said clerk (4).

After the publication of *all* the parts of "The Professor at the Breakfast Table" in said twelve numbers of the *Atlantic Monthly* (4)—such publication having been completed prior to November 23, 1859 (2 and 3)—and on December 21, 1859, Oliver Wendell Holmes entered "The Professor at the Breakfast Table" for a copyright in his own name (4).

On December 22, 1859, and during many years thereafter, Ticknor & Fields, under an agreement with Oliver Wendel Holmes, published the whole of

"The Professor at the Breakfast Table" in separate book form (5).

No notice of copyright by *Ticknor & Fields* was inserted in any copy of "The Professor at the Breakfast Table," published in separate book form, the only notice of copyright given in those copies being a notice of copyright entry by "Oliver Wendell Holmes" (5).

The bill fails to allege a renewal of the copyright of the December, 1859, number of the *Atlantic Monthly*.

The bill alleges that in 1887 Oliver Wendell Holmes deposited a printed copy of the title of "The Professor at the Breakfast Table" a second time, and took the other steps prescribed by statute for renewing a copyright (5).

The defendant is charged solely with having sold since October 1, 1899, copies of "The Professor at the Breakfast Table," "all of which copies were copied by the defendant from said twelve numbers of the *Atlantic Monthly* and were exact copies, word for word, of said twelve parts of "The Professor at the Breakfast Table," which were printed and published in the aforesaid numbers of the *Atlantic Monthly*, and none of said copies contained any other or additional matter whatsoever, and that upon each and every copy of said book so sold by defendants a notice appeared on the title page stating that the same was reprinted from the original text as published in the *Atlantic Monthly* (6).

POINTS.

I.

The alleged copyright by Oliver Wendell Holmes on "The Professor at the Breakfast Table" was wholly invalid.

The bill states (4) that Dr. Holmes deposited the title of "The Professor at the Breakfast Table" for copyright *after* the publication of all the parts of said work entitled "The Professor at the Breakfast Table" in the said numbers of the *Atlantic Monthly*. Such publication in the *Atlantic Monthly* was completed prior to November 23, 1859 (2 and 3), and Dr. Holmes entered his work for copyright on December 21, 1859 (4).

The serial publication of "The Professor at the Breafast Table" in the *Atlautic Monthly*, prior to any step being taken by Dr. Holmes towards securing a copyright of that work, invalidated the copyright thereof subsequently entered by Dr. Holmes (Holmes *v.* Hurst, 174 U. S., 82; affirming s. c., 51 U. S. Appeals, 271; affirming s. c., 76 Fed. Rep., 757).

II.

The part of "The Professor at the Breakfast Table," published in the December, 1859, number of the *Atlantic Monthly* is not entitled to protection under the copyright of that number taken out by Ticknor & Fields, because Ticknor & Fields, under a contract with Dr. Holmes, afterwards published that part of "The Professor at the Breakfast Table" *without giving notice of the copyright entered by Ticknor & Fields.*

(*a.*) On December 22, 1859, and during many years afterwards, Ticknor & Fields, under an agreement with Dr. Holmes, published the whole of "The Professor at the Breakfast Table" in separate book form (p. 5) without giving any notice of the copyright entered by *Ticknor & Fields.* The bill (p. 5) expressly avers that in the several copies of every edition of "The Professor at the Breakfast Table" so published in separate book form, Oliver Wendell Holmes and Ticknor & Fields inserted no notice of

copyright except as follows: "Entered according to Act of Congress in the year 1859 by *Oliver Wendell Holmes* in the Clerk's office of the District Court of Massachusetts," except that after June, 1874, the notice was "Copyright 1859 by *Oliver Wendell Holmes.*" This notice was only notice of the copyright attempted to be entered by Oliver Wendell Holmes on "The Professor at the Breakfast Table," a copyright which was wholly invalid because entered after the publication of the entire contents of that work (Point I., *supra*). But this notice of copyright by "Oliver Wendell Holmes" was not a compliance with the notice required by § 5 of the Act of 1831, of the independent copyright entered by *Ticknor & Fields* on the magazine number, in that the name of Ticknor & Fields is *wholly* omitted from such notice, and it contains nothing to indicate that it was a notice of copyright taken out by Ticknor & Fields (Point IV. of brief on "The Minister's Wooing," *supra*, where the point is discussed at length).

(*b.*) Much was said in the appellant's brief in the Court below as to the interests, legal and equitable, of an author and his publishers, *inter sese*, in a copyright entered by the publishers in their own name; and it was there urged that the magazine copyright, entered by Ticknor & Fields, was held by them in trust for Dr. Holmes, and that "when the sale of the magazine was at an end and the publishers had no more than a nominal interest in the copyright, further notice in their names was calculated to mislead the public as to the real *ownership* of the copyright"; and, also, that "it would be a narrow construction to say that a man is entitled to secure his copyright in the name of some one else and to lose it by notifying the public that it is *his.*"

This contention of the appellants proceeds upon the misconception that the purpose of the statute in requiring notice of copyright is to give information of the name of the person by whom the copy-

right is *owned* and not the name of the person by whom it was "*entered.*" In other words, the contention is that if, after entering the copyright in their own names, Ticknor & Fields had assigned it to Dr. Holmes, a notice should thereafter untruly say that it was "entered" by Dr. Holmes, and that if he thereafter assigned it to John Doe the notice thereafter should again untruly state that the copyright was "entered" by John Doe, and so on. The mere statement of such a proposition contains its own refutation. Whatever the original or subsequent *ownership*, legal or equitable, of a statutory copyright, the fifth section of the Act of 1831 requires that information of copyright "being *secured*"—not *owned*—shall be given by stating the name of the person by whom it was "*entered*"—not *owned*—"in the several copies of each and every edition published *during the term secured.*" *That name is fixed by the record of entry and is unchangeable throughout the term.*

III.

The part of "The Professor at the Breakfast Table" published in the December, 1859, number of the *Atlantic Monthly*, is not entitled to copyright protection for the further reason that the copyright on that *magazine number* was never renewed.

All that the bill avers is that in June, 1887, Oliver Wendell Holmes recorded the title of "*The Professor at the Breakfast Table*" a second time; that a copy of that record was duly published, and that two copies of "The Professor at the Breakfast Table" were deposited with the Librarian (p. 5). These steps would have renewed the copyright of "The Professor at the Breakfast Table" entered by Oliver Wendell Holmes, had not that copyright been void *ab initio* by reason of the prior publication of

the entire work in the *Atlantic Monthly* (Point I., *supra*). *Where a copyright is originally invalid, no valid renewal can be secured* (Wheaton *v.* Peters, 8 Peters, 591, 654; Drone Copyright, 261). These steps, taken by Dr. Holmes, were wholly ineffectual to renew the copyright of the *magazine number*. U. S. R. S., § 4954, enacts that "The author * * * shall have the *same exclusive right* continued for the further term of fourteen years upon recording the *title* of the work * * * a *second* time, and complying with all other regulations in regard to original copyrights within six months before the expiration of the first term."

"The *same exclusive right* is continued the second term *that existed the first*" (Wheaton *v.* Peters, 8 Peters, at p. 663).

The literary compositions, including the part of "The Professor at the Breakfast Table," which were published in the magazine number received copyright protection—*not under separate copyrights*—but through the *single* copyright of the magazine number as an *entire* work, and a suit for the reproduction of any part of that number must proceed for an infringement of a copyright of that number. (Bennett *vs.* Boston Traveler Co., 101 Fed. R., 445; Harper *vs.* Shoppell, 23 Blatch., 431, 432). *There was no other copyright to renew.*

What was the recorded title of the magazine number? "No. 26 Atlantic Monthly" (p. 4). *That title was not recorded the second time.* To record the title, "The Professor at the Breakfast Table," is not to record the title, "No. 26 Atlantic Monthly." As well might it be claimed that to record the title of any of the other compositions, contained in the magazine number, would be to record the title of the magazine number.

It was claimed below by appellants that the publishers had no right of renewal on Dr. Holmes' work. This may well be, but we are not dealing with a renewal of a copyright of Dr. Holmes' work.

The copyright of his work was void *ab initio*, because entered after publication (Point I.). We are dealing with a copyright of the *magazine number* protecting a part of his work *as a part of that copyrighted magazine number*. It may be, also, that the publishers had no right of renewal of the copyright of the magazine number, but that question is not presented here.

The appellants further claimed below that "Dr. Holmes had certainly no right to renew the copyright on the *Atlantic Monthly* for December, 1859." If this be so, then the appellants concede away their case because *there was no other copyright to renew*. There was no other copyright save that of "The Professor at the Breakfast Table" entered by Dr. Holmes, and that could not be renewed, because it was invalid originally (Point I., *supra*).

Whether or not Dr. Holmes could have renewed the copyright of the magazine number is a purely academic question, for he took no steps whatever to renew that copyright. If the statute did not authorize him to renew that copyright, then he lost the privilege of renewal through his own disregard of the plain and simple provisions of the act. Originally all that he had to do was to copyright his composition in his own name and before any publication thereof. Thereupon, he could publish his work serially in a magazine or in separate book form or otherwise, with notice of the copyright entered by him. When the time to renew came around, he would have had simply to deposit the title of his composition a second time and take the other prescribed steps to secure renewal. *This plain course, mapped out by the act, Dr. Holmes did not choose to follow.* He secured no copyright protection, except for a part of his work, and that under a copyright entered in the name of his publishers in a magazine number. If he could not legally renew it, then the situation is due to his own neglect to protect himself.

We contend, however, that *had nothing occurred*

during the first term to invalidate the copyright of the magazine number, Dr. Holmes could have renewed that copyright for the protection of his composition, embodied in that number. To the extent of that composition he was the "author" of that *copyrighted* magazine number and *as such*, and not as author of the *uncopyrighted* work entitled "The Professor at the Breakfast Table," he could secure a renewal of the copyright of such magazine number for the protection of his composition therein contained. The appellants were at great pains below to establish the very clear legal proposition that a person may secure copyright protection for part of a work by entering the whole for copyright, although he is not entitled to copyright the remainder of the work. *May he not, then, by exact parity of reasoning, renew the copyright of the whole and thereby continue the protection of the part?* But the steps to secure a renewal of copyright of the *magazine number* were to deposit in the proper office *its* title, to wit, "Number 26 *Atlantic Monthly*" (p. 4), and two copies of the number, a second time, and publish the record. This the author did not choose to do.

IV.

The decrees of the Courts below should be affirmed.

ANDREW GILHOOLY,
Of Counsel for Appellee.